No: 50895-8-II

COURT OF APPEALS, DIVISION II OF THE STATE OF WASHINGTON

IN RE APPEAL OF ORDER GRANTING SUMMARY JUDGMENT OF:

CITIMORTGAGE INC.
Appellee,

and

Paul Moseley
Appellant

Appeal from the Superior Court of Jefferson County
Case No: 16-2-00216-1

APPELLANT'S AMENDED REPLY BRIEF IN REBUTTAL

TO RESPONDENT'S AMENDED RESPONSE BRIEFP

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I. Rebuttal to Respondent's Statement of the Case

CITIMORTGAGE INC., the Respondent (here after "CMI"), makes assertions that are irrelevant, untrue and unsubstantiated such as CMI's assertion Resp. Br. at 1, "Rather than repay the loan, Moseley… … hoped to somehow escape his debt without actually paying for it." CMI fails to cite to the record as required pursuant RAP 10.3(a)(5) which specifically requires the statement of the case must be relevant to the issues presented for review which it is not and it must reference to the record for each factual statement, which it fails to do until Pg. 4 of CMI's response. Having made many assertions leading up to pg. 4 and void of any citations to the record regarding the irrelevant, off point and mis-leading statements, also puts the Respondent's Brief in violation of RAP 10.3(a)(6) which requires the argument in support of the issues presented for review as well as reference to relevant parts of the record. CMI's first apparent attempt to cite to the record Resp. Br. at 1 Para.2, Fisher cites to "App. Br. at 5-6" to which he asserts that Moseley made a "payment as part of a scheme to pay pennies on the dollar on the loan." He fails to point to the record but the appellant can only surmise that Fisher is referring to CP 33 pg.9 line17 which was in fact legal tender for the full satisfaction of all monies allegedly owed including interest, fees and

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penalties in the amount of $283,839 made payable to CMI on February 16, 2012 and confirmed by Notary Presentment in Exhibit d, CP33. Mr. Fisher belabors moot and irrelevant cases brought years ago by Moseley in federal court to determine why funds were not accepted and put an end to the matter. Next, at Resp. Br. at 4 CMI, relies on four declarations that should have been stricken as hearsay because the proper burden of the hearsay exception rule was not appropriately applied by the trial court which is the first relevant issue that the respondent makes reference to as part of the issues on appeal. Mr. Fisher, for the Respondent, closes out his statement of the case Resp. Br. at 5 by noting "After Moseley appealed to this Court, an Order of Sale issued on January 26, 2018." That in itself is wholly irrelevant to the issues presented for review, is inconsistent with RAP 10.3(a)(5) and to add insult to injury, the Order was not successful and was not executed. Mr. Fisher should be sanctioned for wasting the Court's time in violation of RAP 10.3.

II. Rebuttal to Respondent's Arguments

In section A. of Resp. Br. at 5, Mr. Fisher makes a bold mis-representation that with the exception of the "New limitation-period defense to Foreclosure, All of the supposed Legal and Factual Disputes... ...were adjudicated against Moseley" as he claims that essentially every contested issue was already litigated and lost in previous lawsuits filed in

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federal court. This is a ridiculous assertion. The mere fact that every issue before this Court was a direct result of CMI's later attempt to foreclose judicially gave rise to each issue presented for review herein. Not one of the issues could have possibly have been litigated before because they had not yet occurred. All the issues before this Court have been created as a result of CMI's Complaint against Moseley. Assignments of Error that were presented in App. Br. 7-11 could not have possibly been previously litigated in federal lawsuits; there are no protections based on collateral estoppel regarding the issues presented on appeal and the case law that Fisher cites is irrelevant. Accordingly, the five issues in controversy presented on appeal are All issues that have arisen from the complaint filed by CMI and could not have been previously litigated. No issues on appeal could have possibly been litigated previously because each issue was directly raised in this specific case that is on appeal. The issues Mr. Fisher raises are red herrings, not relevant to this case, and are not at issue before this Court. Notwithstanding, The issues that CMI claims were "litigated," were all dismissed in the trial court summarily, without a trial, evidentiary hearings, or a jury trial. If Fisher is referring to federal cases none of those issues are relevant to this case and the same holds true, each issue was dismissed summarily.

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CMI's arguments themselves admit that the doctrine of collateral estoppel is not applicable because it does not meet the requisites that they spell out clearly. First, none of the issues on appeal are identical. Second, there has been no judgment on the merits. Third, collateral estoppel works injustice when a constitutional right to a jury trial is denied and a Citizen's day in court is denied and the owner is summarily removed from their home. None of the bullet points made on behalf of CMI by Mr. Fisher are part of the record before the Court of Appeals.

Mr. Fisher attempts to evoke a claim that res judicata bars Moseley's issues brought on appeal before this Court at Resp. Br. at 7 and suggests these issues could have been raised in previous litigation. All eleven assignments of error were raised in the trial court in 2017 and could not have been previously known the errors the trial court was going to make. Mr. Fisher's assertions are disingenuous because the five issues before this Appellate Court were all raised as a result of CMI's action against Moseley for judicial foreclosure and could **not** have been previously litigated: First, The statute of limitations defense, because CMI brought the action more than 6 years after alleged default and threat of acceleration with at least a portion of Moseley's alleged debt barred as the Statute of Limitations period had run on payments due October 1, November 1, and December 1, of 2010 and thus calculation errors at a

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minimum and arguably the remedy of judicial foreclosure should be barred as well App. Br. at 20-26. Second, the FALSE Assignment of Deed of Trust defense because MERS had not been ruled as an unlawful beneficiary in violation of the Deed of Trust Act by the Washington Supreme Court until the Bain v. Metro and Bain v. MERS cases of 2012. The first federal case had concluded prior to this time, full satisfaction was made to CMI subsequently and refused which gave rise to the second federal lawsuit where the issue of validity of the assignment of the Deed of Trust was not of consequence App. Br. at 26-27. Third, Broken Chain of Title defense would not be discovered until September 1, 2017 when the purported original "Note" that was fabricated on tracing paper was presented in the trial court and the Deed of Trust was absent App. Br. at 27. Either the "Note" presented by CMI was fraud upon the Court or the Note and the Deed were separated as demonstrated on the record. RP 29 ln. 11-17. Broken Chain of Title defense could **not** have been litigated previously as CMI suggests. Fourth, Counterfeit Falsified Note defense would have only come to light in the trial court when the falsified document was presented to the defendant for the first time on September 1, 2017 App. Br. at 29. Contrary to Mr. Fishers disingenuous assertion, this issue could **not** have been litigated previously. Fifth, Constitutional Right to a Trial by Jury defense would for obvious reasons not be relative

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to any previous litigation or available to Moseley prior to an adverse action such as the judicial foreclosure action CMI brought, CMI staking a claim to Moseley's property and summary judgment having been awarded inappropriately by the trial court which Ordered the conveyance of Moseley's real property by judicial foreclosure, without regard of the protections asserted by Moseley in his opening brief signature section of Moseley's answer. CP 16 at 37. The right to a trial by jury is guaranteed by the Federal and Washington State Constitution in matters of property in controversy over $20 App. Br. at 31. This case may be precedent setting.

As can easily be determined, CMI's assertions of Collateral Estoppel and Res Judicata are wholly without merit and the case law presented by CMI in this section is not relevant. If CMI's intent was to put an end to strife, and produce certainty as to individual rights, it would have filed and served the complaint timely and would have answered Moseley's many telephonic and written requests for information as far back as 2010. CMI's assertions that Moseley argues theories "ad nauseum" is humorous and CMI's attempts at invocation of legal doctrines are disingenuous at best.

In section B of Resp. Br. at 8, CMI in its second paragraph, makes true statements and correctly cites proper authority. Moseley agrees that the Statute of Limitations runs on each installment separately, but what CMI

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fails to recognize are the installments that Moseley allegedly owed and had not made more than 6 years prior to the commencement of the complaint, clearly exceeded the limitation period. CMI also dismisses other time limiting statutes that may apply because of CMI's exercising other remedies in previous attempts to foreclose that were unsuccessful and voluntarily discontinued. CMI has not considered that its untimely complaint absolutely bars the remedy of Judicial Foreclosure and the real Note as opposed to the fake note presented in the trial court, Whatever real Note might exist, may be unsecured having lost the enforcement remedy under the Deed of Trust and barred by the statute of limitations as in *Walcker v. Benson and McLaughlin, PS, 904 P.2d 1176 (Wash. Ct. App. 1995.)* This argument was argued in detail by Moseley at CP 51 p.2 as a genuine issue of material fact in controversy. If the debt is valid, the debt might still remain but it would be an unsecured debt according to the law both by broken chain of title and for the sake of this argument, loss of the judicial foreclosure remedy for failing to file a timely action wherein the statute is not tolled as held in *Winston v. Richard W. Wines, Inc.*, 56 Wn.2d 192, 351 P.2d 929(1960), where this Court determined that there was no "statutory prohibition," no tolling under RCW 4.16.230 for a non-judicial remedy. More argument on this tolling issue herein.

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In paragraph 3 of Resp. Br. at 8-9 Mr. Fisher is simply not doing his job well. Here Mr. Fisher makes two egregious mistakes. First he asserts in error and suggests that "On appeal, Moseley for the first time suggests that at the very minimum, the trail court should have considered that the installments due prior to six years before CMI commenced the action, would most assuredly be barred from the computation of the amounts allegedly owned by Moseley." On page nine, Fisher goes on to say that Moseley did not make arguments on the computation of the amounts owed in the trial court. **This is clearly a purposeful misrepresentation or an oversight by Mr. Fisher**. On the record Moseley did in fact argue in the trial court that the computations at minimum were wrong because some payments were clearly outside the statute of limitations, CMI even admitted to billing errors repeatedly as included in the record. CP 52 at p.2 sec.12 with evidence in addendum. More importantly, Moseley did in fact contest the computation of amounts in the trial court. *See* CP 51 at p.6 sec. 3 which reads:

> **"Two installment payments are outside the SOL for this action and at a minimum the accounting is in error. CMI having not disassociated those installments that have clearly run the SOL, nor considered the penalty fees accessed to the account that fall under RCW 4.16.115 and are limited to an actionable commencement within 3 years time from the time after the cause of the action accrued. At the very least, CMI's accounting is inaccurate and as recent as August 14th, 2017 CMI admitted to the same, see original notice letter attached as Exhibit 1 in Defendant's Declaration in Opposition to Motion for Summary Judgment (emphasis added)."**

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For Mr. Fisher to claim this issue is new on appeal is disingenuous misleading, and simply untrue. Mr. Fisher's second egregious mistake is found in the footnotes of p.8 of CMI's response brief, where Fisher asserts an unfounded accusation that Moseley attempted to "cut and paste documents in order to suggest that the payments on the Note were accelerated prior to December 7, 2010." All documents presented were true and accurate copies of the notices received to prove the account had in fact been accelerated. The only reason this evidence was entered into the record by Moseley was because prior legal counsel for CMI in the trial court, emphatically denied the account had been accelerated CP 28 p.10 line 12. The evidence showed that the account had clearly been accelerated which then made CMI shift its arguments dramatically. The cut and paste that Fisher refers to, were in fact true and accurate copies of documents and a true copy of the bottom portion of the payment stubs that Moseley had been receiving with the statement of account for years, each proving not only had the account been accelerated but was accelerated at the alleged Notice of Default dated **December 2, 2010** and confirmed intent to accelerate as a result by the follow up letter from CMI dated December 17, 2010 to which CMI refers to in the foot notes in Resp. Br. at 8. This acceleration is confirmed and consistent with the case law cited by CMI in the trial court under *Cook v. Strelau, 127 Wn. 128, 133-36, 219 P 846 (Wash. 1923).* Cook held, "Some Affirmative action is required, some action by which the holder of the note makes known to the payors that he intends to declare the whole debt due." When CMI made these arguments it was still emphatically denying that the account had been accelerated and

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these "cut and paste" documents CMI refers to are in fact accurate copies of the originals that specifically denote default and acceleration "YOUR LOAN HAS BEEN ACCELERATED UNDER STATE LAW" argued by Moseley at CP 33 at 5 and evidenced in CP 34 exhibit b. This issue was argued in detail at CP 51 at 3. CMI in its Appellee reply continually cites to court papers that have no bearing on its accusations nor has relevance to the case at hand or the issues on appeal. This appears to be a brash attempt by Mr. Fisher to impugn Moseley's character. Cut and paste is simply not true and albeit some of CMI's correspondence was not dated because it was the bottom part of a payment stub, the statement was not relevant so the stub entered, was evidence to prove CMI's claim that the account had never been accelerated was simply not true. Notwithstanding, the letter Mr. Fisher refers to dated December 17, 2010 threatened acceleration therefore by well-established law and consistent in Cook v. Strelau, acceleration is based on the alleged default Notice dated December 2, 2010 which triggers the Statute of Limitations in all cases of judicial foreclosure and non-judicial foreclosure. CMI's letter dated December 17, 2010 confirmed the affirmative action of acceleration and specifically spelled out that it was because of the alleged default months prior as indicated in the Notice of Default dated December 2, 2010. CP 33 at 5.

Creditors such as CMI are attempting to defeat the quiet title provision of RCW 7.28.300, which allows debtors to remove outlawed deeds of trust. Moseley argued in the trial court at CP 16 at p.14. Creditors argue that they should not be subject to strict applications of a six-year

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statute of limitations to bring a judicial action on a defaulted deed of trust, but instead argue for tolling for incomplete non-judicial foreclosure proceedings, which should be added together to provide months or even years of additional protection from a statute of limitations defense beyond the six years the legislature deemed appropriate RCW 4.16.040; Deutsche Bank recently sought *840 days* of tolling for its non-judicial foreclosure proceedings on this very subject, pending the Washington State Supreme Court *Merceri v. Deutsche Bank et al*, No. 95654-5. In a similar recent case, *Washington Federal NA v. Pacific Coast Construction LLC et al*, No. 51197-5, The Supreme Court granted *Pacific Coast's* Motion to file an amicus brief in support of petition for review in *Merceri v. Deutsche Bank* on May 30, 2018 (emphasis added). The Supreme Court will decide.

In the past 4 months, without the required statutory analysis and without thoughtful consideration of the issue, Division One and even more recently Division Two have accepted the creditors' position with a conclusory statement: Service of the written notice of default tolls the statute of limitations until 120 days after the date scheduled for non-judicial foreclosure of the deed of trust. *Bingham v. Lechner*, 111 Wn.App. 118, 127-31, 45 P.3d 562 (2002); see RCW 61.24.040(6) (permitting trustee to continue the trustee's sale for periods not exceeding 120 days). *Heintz v. U.S. Bank*, No. 76297-4-I, slip op. at 5-6 (Div. 1, Jan.

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16, 2018)(unpublished, *review denied* on other grounds May 1, 2018, No. 95484-4);[1]

Appellate Courts in both divisions have wrongly held that the statutory limitation period applicable to enforcing payment of a loan is tolled during the duration of a non-judicial foreclosure proceeding up to 120 days after the original sale date. Citing to *Bingham v. Lechner*, 111 Wn.App. 118, 129-31, 45 P.3d 562 (2002); *accord Albice v. Premier Mortg. Servs. of Wash., Inc.*, 157 Wn.App. 912, 927-28, 239 P.3d 1148 (2010)). The statutory limitation period is tolled for 120 days after the original sale date even when the trustee does not exercise his ability to continue the sale. *Bingham*, 111 Wn.App. at 131 (trustee's "failure to [continue the sale] restarted the statute of limitations either on ... the date scheduled for the foreclosure or 120 days thereafter.") *Erickson v. America's Wholesale Lender*, No. 77742-4-I, 2018 Wn.App. LEXIS 811, at *10 (Div. 1 Apr. 16, 2018) (unpublished). The non-judicial foreclosure statutory scheme (RCW 61.24) provides no tolling for either the duration of a non-judicial foreclosure proceeding or for the 120-day continuation period, whether or not the creditor avails itself of a continuation.

[1] *Bingham v. Lechner*, upon which Division One relied in *Heintz* and *Erickson*, did not address any legal basis for a non-judicial foreclosure tolling the statute of limitations. In *Bingham*, the parties agreed that tolling applied, so "the question presented is for how long the statute was tolled." *Id.* at 127. The appellate court did not reach the tolling issue, because it found that no amount of applicable tolling resurrected the creditor's cause of action. "Demopolis's attempt to foreclose in August 1999 was too late.

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Rather than seeking legislative amendments to provide tolling, creditors are pushing our courts to expand the statutory scope, reach, and duration of the Statute of Limitations, a distinctly legislative prerogative. *See Five Corners, supra.* Creditors are urging our courts to not apply the quiet title remedy provided to homeowners under RCW 7.28.300, even after they have waited more than six years to foreclose, are time-barred as a matter of law, and are holding an outlawed deed of trust. It was the legislature's purpose to improve the marketability of real property by removing these outlawed deeds of trust pursuant RCW 7.28.300.

These recent ill-conceived accommodations to these creditors is contrary to the plain language of RCW 4.16.040, RCW 4.16.230, RCW 4.16.170, RCW 7.28.300, CR 2, and CR 3, which permit tolling only for a judicial *"action"* "commenced" by filing a complaint or serving a summons, followed within 90 days by a subsequent filing or service.[2] Clearly, non-judicial foreclosure is not a judicial action. There is no summons or complaint. And since RCW 4.16.230 tolls "commencement of an "action" only as defined in RCW 4.16.170, CR 2, and CR 3, it does not provide tolling for a non-judicial foreclosure proceeding. CP 16 at p.3.

2 Washington's CR3 defines "Commencement of an Action" as follows: "a civil action is commenced by service of a copy of a summons together with a copy of a complaint, as provided in rule 4 or by filing a complaint.

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A notice dated January 13, 2016 from CMI, denotes November 1, 2010 as the actionable date for its remedy. CP 16 Exhibit G. This complaint was not filed until December 7th, 2016, therefore untimely.

The Appellate Court's unprincipled tolling expansion conflicts with this Court's analysis in *Hinchman v. Anderson*, 32 Wash. 198, 207, 72 P. 1018 (1903), applying RCW 4.16.230 and our single action statute, concluding that where a party has a choice of remedies and makes his election, the statute does not cease to run as to other remedies.")-3 In *Hinchman,* the Supreme Court supplied the long-standing common-sense rule that if a creditor *is actually pursuing* one of its remedies, it is not "prohibited" under RCW 4.16.230 from pursuing its remedy, so no tolling is available. This unprincipled expansion of RCW 4.16.230 conflicts with the analysis in *Winston v. Richard W. Wines, Inc.*, 56 Wn.2d 192, 351 P.2d 929(1960), where this Court determined that there was no "statutory prohibition," no tolling under RCW 4.16.230 for a non-judicial remedy. Any Washington court allowing for the tolling of the entirety of incomplete non-judicial foreclosures is in direct conflict with this Court's authority in *Hinchman* and *Winston.*

3 *Hinchman* analyzed the verbatim predecessor of RCW 4.16.230, 2 Bal. Code Sec. 4813, and the verbatim predecessor (with updated pronouns) of Washington's single action statute 2 Bal. Code Sec.. 5893, now codified at RCW 61.12.120. *Hinchman* is still good law, having been applied as it relates to the single action statute in *Deutsche Bank Nat'l Tr. Co. v. Slotke*, 367 P.3d 600, 606, 192 Wn.App. 166 (2016).

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Mr. Fisher argues in the second paragraph of Resp. Br. at 9 that "Had Moseley argued about the **calculations** (rather than arguing that Citi's action was barred in its entirety), Citi could have presented a litany of additional arguments..." Because Moseley did in fact argue the calculations were in error, it seems all the more proper to remand this case to be heard on those arguments that even Mr. Fisher appears ready to argue. CMI cites to *Bingham v. Lechner*, 111 Wn.App. 118 (2002), claiming that non judicial process toll the statute of limitations but to the contrary, higher Courts have agreed that non-judicial remedies cannot toll the statute of limitations because otherwise it could be tolled in perpetuity never allowing a reasonable time limit in which to execute a remedy for a written contract. In *Bingham v. Lechner*, the argument that a sale could be indefinitely continued was rejected and a second attempt to foreclose the deed of trust was barred (emphasis added.) The law is still being written on this subject. The Supreme Court decided in *Jinks v. Richland County, S.C. Supreme Court of the United States April 22, 2003 538 U.S. 456.* That in this case, since Non Judicial foreclosure remedy was exercised and not completed, it cannot be used for tolling otherwise anyone could use that tacktick to toll in perpetuity. Also the statute could begin at the time of acceleration. In *Kirsch v. Cranberry Financial, LLC 2013 WL 6835195, *2, Wash.App. Div.1* Generally, actions based on written contracts must be

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commenced within six years after breach RCW 4.16.040. The general rule for debts payable by installment provides, "A separate cause of action arises on each installment, and the statute of limitations runs separately against each...." When a payment has been delinquent for more than six years it is therefore no longer actionable.

In the foot notes Resp. Br. at 9 refers to Moseley's full satisfaction of the alleged debt delivered to CMI by notary presentment in the amount of $283,839 in February of 2012 as a "failed 2014 Gambit." Mr. Fisher's red herrings and misdated pop shots are not relative to the issues on appeal and aim to distract this Court from the issues. CMI argues that the "clock resets once the promisor executes a new writing expressly acknowledging the debt..." Moseley has never acknowledged the alleged debt nor has proof of a real loan ever been verified despite many requests by Moseley to CMI for such evidence under GAAP. CP 16 at p.5 sec 4.

CMI then goes a step further to suggest that "the written notice of default during the limitations period was an action sufficient to restart the clock on the missed payment." First, the only notice of default on the record is outside the limitation period dated December 2, 2010 and if CMI could simply reset the clock by issuing a new notices of default it would turn the Statute of Limitations on its head and the clock could be reset by CMI over and over again. Whatever CMI is reaching for is simply not in the record, makes no logical sense and is miss applied using case law that

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does not support its argument. Other arguments herein will prove that CMI's tolling excuse has no merit and that the claim is stale and barred.

Finally, the issues before the Court are not new theories as CMI suggests, but are all on the record of the trial court including the issue of alleged debt error in calculations. This case should be remanded to be heard on the merits.

In section C. of Resp. Br. at 10, Mr. Fisher tries to skate the issue of MERS having been defined not as the beneficiary, not simply the lenders nominee in Moseley's Deed of Trust but defined twice as the Beneficiary. Moseley has never contended that any loans touched by MERS are void or uncollectable. They would actually have to be "loans" and the original Notes and Deeds of Trust would have to be held by MERS pursuant Bain v. Metro, to which CMI cites as authority ruled was an invalid beneficiary in the State of Washington and MERS as a beneficiary would violate the Deed of Trust Act. The Courts opinion held that MERS is an "unlawful" beneficiary not "ineligible" as Fisher has twisted the wording. Moseley has never contended that the Deed was void as Fisher alludes but rather Moseley consistently contends that the Deed of Trust is not assignable by a non-beneficiary or an invalid beneficiary. The problem with assigning this Deed of Trust, is that it was assigned by MERS on the public record and is on the court record as a false document because an assignment can only be done by a valid beneficiary according to law. This has not happened so there is no valid assignment of Moseley's Deed of Trust.

CMI claims it is the holder of the Note and is entitled to enforce the Note. Moseley contends that CMI holds a fake note that was forged on

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translucent paper and presented before the trial court. Moseley also points out that the Deed of Trust is the enforcement and security instrument for only the real Note if such a document actually exists. Fisher contends Resp. Br. at 12 that "an assignment of the Deed of Trust is not relevant because under Washington law, the security for the obligation follows the debt." Here again Mr. Fisher pulls a bait and switch. The Deed of Trust is the security and yes, Moseley agrees that the Deed of Trust follows the Note just like a tail follows the dog. But... when the Deed of Trust (the security instrument) is separated from the Note, then the chain of title is broken and the security is lost. In this case the Deed of Trust was unlawfully held and assigned by MERS, an unlawful beneficiary as evidenced on the record, therefore a false assignment to CMI who alleges it holds the "Note." Aside from the fact the note CMI presented was a fake, forgery and poorly contrived on what looked to be rice paper, it was also dis-unified or separated from the Deed of Trust. CMI does not hold the real Note and the Deed of Trust remains improperly assigned and separated from the real Note. As such CMI lacks standing to foreclose. Mr.Fisher subsequently makes arguments that Washington does not require recording of such transfers and assignments but the fact remains that CMI did in fact record the false instrument Assigned by MERS an unlawful beneficiary. CMI recorded the Assignment and is liable for slander of Moseley's title. Fisher's citations are irrelevant and his attempts to escape the penalty of CMI filing false instruments on the public record are a stretch at best.

It is near impossible to determine what Mr. Fisher is trying to convey or what point he is trying to make at Resp. Br. at 12, when he suggests in the second paragraph "And whatever MERS's former interest may be [have] been, there is no authority for Moseley's assertion that MERS is incapable of transferring its interest in a Deed of Trust." Moseley contends MERS is an invalid beneficiary and can't imagine what beneficial interest MERS might have "to transfer" (assign) accordingly. What relevance would it have to this case except to prove Moseley's argument? The fact remains MERS cannot assign what it does not hold and is devoid of any beneficial interest. Fisher's arguments about what the Bain case did not state is simply immaterial. The fact that CMI is holding a FAKE note does not give CMI the right to foreclose.

In section D. of Resp. Br. at 13 Mr. Fisher twists the terminology calling for void documents instead of what they are. The valid documents that are not enforceable, not void. The invalid assignment of the Deed of Trust simply means the DOT is still separated from the real Note if it still exists.

Mr. Fisher then tries to convey that there is no competent authority for Moseley's argument and that "physical separation" is somehow not separation. It is then incumbent on Mr. Fisher to explain to the Court if physical separation of the Note and Deed of Trust occurs, how is it then, not actually separation when one entity holds the DOT such as MERS and another entity such as CMI holds the note. How more separated could these documents be? Mr. Fisher claims that the fake note that he asserts as the original Note is endorsed-in-blank. It's not even the real note to which

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he refers and with no evidence at all, he makes a broad claim that it is endorsed-in-blank.

Mr. Fisher introduces a pool of red herrings in Resp. Br. at 14 when he suggests that Moseley has made an argument that foreclosure was somehow wrongful because the loan was securitized and claims it is Moseley's red herring. This is humorous because there has been no foreclosure so it is impossible for Moseley to argue that foreclosure was wrongful. It simply has not happened. The next red hearing that Fisher throws at the Court is a completely contrived argument that does not exist. Moseley does not make arguments in the trial court or on appeal that securitization changes the relationship of the parties. Securitization is the bundling and converting of an asset to make them marketable as securities so investors can buy the debts of those mortgages that have been bundled. The investors are the ones that have the beneficial interest and the power to foreclose if the terms of the DOT are not met. CMI lacks standing to foreclose because they do no hold the genuine original Note and the security instrument, the DOT has been separated by securitization and title cannot be cured without proper assignment and reunification.

In section E. of Resp. Br. at 15 Mr. Fisher claims that this very same issue of Moseley not signing a fake note has been adjudicated multiple times. This is simply not true nor was the fake note ever presented for Moseley to inspect prior to September 1st so it would be impossible to make arguments of the same nature previously as Fisher suggests. The RP designations that Fisher offers the Court are all at the time of the hearing for summary judgement where Moseley, for the first time (despite

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McCormick's misleading comment at RP 4 ln.2) and was finally allowed to inspect the document. At a cursory glance Moseley could determine instantly that it was fake and a slipshod forgery. The poorly contrived forgery on translucent paper also bore no endorsements. If, as CMI suggests, the Deed of Trust was "Assigned" by MERS and it followed the Note, then an endorsement would be found on the back side of the real Note because it is/was a negotiable instrument. No such endorsement was present. RP 4 ln.9. On the record Moseley denied that was his signature on that document because it was a forgery. RP 4 at ln.12. In the foot note Mr. Fisher suggests that "Perhaps hoping to avoid the consequences of perjury, Moseley did not submit a sworn statement that he [Moseley] did not sign the Note, or that the signatures on the Notes submitted by Citi were forgeries." Moscley contends that it would be impossible to know and have prepared a sworn statement prior to inspection of the document. Any filings of sworn statements entered would then be disallowed as new evidence in the Court of Appeals. If Mr. Fisher would like to take Moseley's sworn statement and the Court would allow, Moseley would be prepared to provide and submit such a statement. When signatures are denied, the burden of proof is on the person claiming its validity pursuant RCW 62A.3-308(a) as argued in appellants amended opening brief pg. 15 where it was noted that Moseley specifically denied the signature both in pleading and at hearing. CP 15 at 6 and RP 4. This RCW provides "In an action with respect to an instrument... If the validity of a signature is denied in the pleadings, the burden of establishing validity is on the person claiming validity..." CMI, neither in the trial court or in respondent's

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reply brief on appeal, have offered either court any evidentiary foundation for their assumption of Moseley's signature after it was denied as required clearly by statute. Failing to do so in both trial and appellate courts, CMI having been given the opportunity to do so, Moseley prevails for a lack of rebuttal or response from the Plaintiff in the trial court and moreover the Respondent in the Appellate Court.

In section F. of Resp. Br. at 16, Mr. Fisher suggests that it is the entry of summary judgment that Moseley contends violates his right guaranteed by U.S. Const. amend. 7. The entry of summary judgement would be proper if there were no issues of material fact in controversy but in this case there were many issues of material fact unresolved. Moseley contends that the summary judgment itself orders an unlawful action to deprive him of his personal property and home by both State and Federal Constitutions, a fair hearing of his peers Trial by Jury. This right was asserted from the outset of Moseley's answer to complaint and was denied by summary judgment being awarded. Any law, judgment, decree, order or rule that wars with the Constitution is void and of no legal effect. Accordingly, any foreclosure that may improperly ensue without due process will forever cloud title on the subject property. Moseley listed eleven court errors and 5 issues of material fact in controversy that should have allowed Moseley his day in court and the issues tried on their merit.

In section G. of Resp. Br. at 17, Mr. Fisher tries to convince the Court that the trial court properly considered all the declarations. The Declarations themselves admitted that these individuals had no firsthand knowledge but relied rather, on un-named people that supposedly had

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knowledge of the procedures for records storage. Would not those people have been better candidates to produce the declarations used in the trial court? Moseley moved the trial court to strike three declarations of people with no knowledge of the facts or the account and to strike the testimony of attorney McCormick based on hearsay and consistent with *Trinsey v. Pagliaro D.C.Pa.1964, 229 F. sup. 647.* The evidence provided to this Court regarding previous federal court decisions adverse to Moseley are cheap shots that are completely irrelevant to the issues on appeal before the court which is a violation of RAP 10.3(6). Additionally the fake note offered in the trial court and purported as the "original note" that Mr. Fisher continually refers to is not an original at all as discussed previously in Section E. Scrutinized at a glance this document is clearly a poorly contrived forgery on translucent paper devoid of endorsements. Fisher claims that both witnesses provided a foundation for the admission of the documents appended to the declarations but neither met the requisites for the case law that Fisher presented and cited to. Fisher cites to *State v. Ziegler*, 114 Wn.2d 533,789 P.2d 79 (1990) in an attempt at establishing the test for reliability whereas Fisher claims there is no apparent motive to falsify. Moseley begs to differ. As held in Bain v. Metropolitan, MERS cannot obtain foreclosure power without the note. CMI has clear and obvious motive and the case law cited, not applicable to a fake note.

In section H. of Resp. Br. at 20, Mr. Fisher admits it is true that the summary judgment order does not list the evidence called to the attention of the court as required, yet claims there is no dispute as to the substance of the summary judgement record. Moseley argues in reply, that the

substance of the summary judgement is devoid of evidence in violation of CR 56(d) and RAP 9.12. In the foot notes Resp. Br. section H, numbered 6 and 7, Moseley cannot find the relevance to any issues on appeal.

In section I. of Resp. Br. at 21, Mr. Fisher maintains that CMI has the right to foreclose judicially after multiple failed attempts to foreclose non-judicially were voluntarily discontinued. It stands to reason that if CMI elected a remedy and failed not once but twice then the law would provide a limited time in which to proceed on a new remedy if a new remedy is available. In this case it would seem that RCW's prohibit a new remedy such as in RCW62A.2A-506(3). If this RCW is not applicable it should be, just as RCW62A.2A-506(2) as it calls for the consistency in the spirit of the law and the way it should be interpreted and applied. Mr. Fisher relies on RCW 61.24.100(2)(a) "commencing an action on a [real] promissory note that is secured by a [properly assigned] Deed of trust ..." What CMI lacks is a <u>real</u> Note and a proper assignment of DOT and the non-judicial process's CMI discontinued does not toll the time period for the statute of limitations.

III. Rebuttal to Request for Fees on Appeal

In order for CMI to be entitled to recover attorney fees and costs first they would need to prevail and second they would have to be a real "Lender" as defined in the DOT. They have failed both and refused to show an accounting of a debit from CMI's account as a "Lender," as defined in the Deed of Trust, and a credit to the borrowers account as required under GAAP (Generally Accepted Accounting Principles).

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IV. Conclusion

The Supreme Court of Washington is currently considering review of cases involving the mis-application of the tolling time against the Statute of Limitations on installment accounts. The Non-judicial foreclosure process is not an "action," therefore the courts to allow such tolling is contrary to well established law and clearly stated statute. The Washington Supreme Court's review of *Merceri v. Deutsche Bank*, will confirm CMI does not have standing to foreclose on Moseley's property.

CMI is not a party of interest and additionally failed to file a timely complaint. CP 16. CMI is not the holder of the Note in due course, but rather the holder of a poorly fabricated fake note, a forgery and has brought fraud upon the court. The mere offing of such a document on the record at trial is subject to $5,000 penalty pursuant RCW 40.16.030. As much as Mr. Fisher would like to believe that "Citi was entitled to foreclose, and did so in a timely fashion," that simply is not the case. The subject Property has not been foreclosed because the recent Sheriff Sale was cancelled.

Prayer for Relief:

Reverse the Order of the trial court granting summary judgement in favor of CMI and remand the case to be tried on the merits of genuine issues of material fact in controversy.

Dated: June 1, 2018

By _____

Paul Moseley, Appellant

Expressly demands the right to trial by jury

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CERTIFICATE OF SERVICE

Court of Appeals Case No. 50895-8-II

Superior Court Case No. 16-2-00216-1

The undersigned hereby certifies that a true and accurate copy of the foregoing filed with the clerk of the Washington State Court of Appeals, Division Two and was mailed to the attorney of record for the Appellee, CitiMortgage Inc. an entity lacking standing in a matter of complaint filed December 7th 2016, this 1st, day of June, 2018.

The office of:
Supplemental Counsel:
Brad Fisher
DAVIS WRIGHT TREMAINE, LLP,
1201 Third Avenue, Suite 2200
SEATTLE, WA 98101

Declared under penalty of perjury under the laws of the State of Washington,

This 1st day of June, 2018

Paul Moseley
Served by USPS Mail